Supreme Court, U.S.
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No. _____ 071282 APR 9 - 2008

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In The Supreme Court of the United States

SHERRYL ANN SNODGRASS,

Petitioner,

v.

ELIZABETH ROBINSON, Chair of the Iowa Board of Parole, in her individual and official capacity; KAREN MUELHAUPT, Vice Chair of the Iowa Board of Parole, in her individual and official capacity; RICHARD S. BORDWELL, Member, Iowa Board of Parole, in his individual and official capacity; CURTIS S. JENKINS, Member, Iowa Board of Parole, in his individual and official capacity; BARBARA BINNIE, Member, Iowa Board of Parole, in her individual and official capacity; Iowa Board of Parole; and CHESTER J. CULVER, Governor of Iowa,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the Court of Appeals correct in concluding that Iowa's retroactive application of a statute enacted in 1995 to a prisoner who received a life sentence for a crime that was committed in 1981, with the consequence that she is denied the annual interviews by the Board of Parole that she previously was guaranteed and that may well have led to the commutation of her sentence and her release on parole, cannot under any set of facts be found to violate the *Ex Post Facto* Clause of Article I § 10 of the United States Constitution?

PARTIES TO THE PROCEEDING

Petitioner (appellant and plaintiff below):

SHERRYL SNODGRASS

Represented by Barbara Bader Aldave, University of Oregon School of Law, 1221 University of Oregon, 1515 Agate Street, Eugene, OR 97403, (541) 346-3985;

and

Marianne Dugan, 259 East 5th Avenue, Suite 200-D, Eugene, OR 97401, (541) 338-7072.

Respondents (appellees and defendants below):

ELIZABETH ROBINSON, Chair of the Iowa Board of Parole, in her individual and official capacity; KAREN MUELHAUPT, Vice Chair of the Iowa Board of Parole, in her individual and official capacity; RICHARD S. BORDWELL, Member, Iowa Board of Parole, in his individual and official capacity; CURTIS S. JENKINS, Member, Iowa Board of Parole, in his individual and official capacity; BARBARA BINNIE, Member, Iowa Board of Parole, in her individual and official capacity; Iowa Board of Parole; and CHESTER J. CULVER, Governor of Iowa.

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PARTIES TO THE PROCEEDING – Continued

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and

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals in this case.

CITATIONS FOR OPINIONS BELOW

The Eighth Circuit opinion is reported at *Snodgrass v. Robinson*, 512 F.3d 999 (8th Cir. 2008), and is set forth in the Appendix at App. 1 through App. 9. The District Court's Order dismissing petitioner's case is not reported, but is found at *Snodgrass v. Robinson*, No. 4:05-cv-00520-RAW, 2007 WL 275927 (S.D. Iowa Jan. 24, 2007), and is set forth in the Appendix at App. 10 through App. 28.

BASIS FOR JURISDICTION IN THIS COURT

The decision of the Eighth Circuit Court of Appeals was entered on January 11, 2008. App. 1-9. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This is an action brought under 42 U.S.C. § 1983, which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage,

> of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Petitioner alleges that respondents violated her rights under the *Ex Post Facto* Clause of Article I § 10 of the United States Constitution, which reads in relevant part:

> "No State shall . . . pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts."

STATEMENT OF THE CASE

Petitioner and a male codefendant were tried jointly in 1982 for the 1981 killing of petitioner's husband in Ottumwa, Iowa. Both petitioner and her codefendant were convicted of first-degree murder, a

class "A" felony under Iowa law. Each received the mandatory sentence of life imprisonment. *See State v. Snodgrass*, 346 N.W.2d 472 (Iowa 1984).

At the time of the crime of which petitioner was convicted, Iowa Code § 902.2 (1981) provided that the Iowa Board of Parole would, on its own initiative, interview a class "A" felon "within five years of his or her confinement and regularly thereafter" to determine whether he or she should be considered for release on parole. This statute was fleshed out by the Parole Board's administrative rules, which provided that the Board would interview each class "A" felon at intervals of five, ten, thirteen, and fifteen years from the time of his or her commitment, and annually thereafter. These rules also stated that the felon would be given "ample opportunity to express views and present materials." Iowa Admin. Code § 205-14.2(1)(902) (1989).

If the Board formed the opinion that a particular person serving a life sentence for a class "A" felony should be considered for parole, it was to "recommend to the governor that the person's sentence be commuted to a term of years." Iowa Code § 902.2 (1981). When the governor did commute a life sentence to a term of years, the person whose sentence was commuted became eligible for parole under the same standards as were applicable to felons of other classes. *Id.* The essential test was whether the Board believed there was a "reasonable probability" that the person was "able and willing to fulfill the obligations of a law-abiding citizen." Iowa Code § 906.4 (1981).

When petitioner appeared for her thirteenth-year interview by the Board of Parole in the summer of 1995, the Board told her it could not review her case because a "new law" was in effect. App. 13. This "new law" was the revised version of § 902.2, which does not provide for automatic interviews of class "A" felons. 1995 Iowa Acts, ch. 128 § 1 (codified at Iowa Code § 902.2 (1995)); App. 13-14. Today, a class "A" felon wishing to speak before the Board of Parole may, "no more frequently than once every ten years," submit to the Governor an application requesting that his or her life sentence be commuted to a term of years. *Id.* After the application has been filed and has been forwarded to the Board for an investigation, the Board is to interview the felon and report its findings and recommendations to the Governor. *Id.*

Despite her best efforts to satisfy the conditions to filing an application for clemency – including the requirement that she pay more than $4500 in decades-old court costs – petitioner was unable to do so for many years. Finally, with the assistance of a *pro bono* attorney, she submitted her first and only application in February 2004, approximately twelve years after her last previous interview with the Board. Three months later, the respondent Chair of the Board of Parole sent petitioner's attorney a letter stating that the Board "ha[d] received 80 commutation applications from the Governor's Office," that "all applications need[ed] to be reviewed within ten years," and that the applications, which dated back to 1994, were "being processed in order as received."

Because petitioner was "number 80 on the list," it could be "several years" before her case was considered. The letter concluded with these two sentences: "As stated, cases are currently being reviewed as they are received. However, at some point, this may be altered to allow cases that appear meritorious to be given earlier consideration." App. 14-15.

In order to obtain an expedited review, petitioner filed this suit – invoking 42 U.S.C. § 1983 and alleging, *inter alia*, that "[respondents'] retroactive application of the present version of § 902.2 to [petitioner's] case violates the *Ex Post Facto* Clause of Article I § 10 of the United States Constitution" – in the United States District Court for the Southern District of Iowa on September 14, 2005. App. 16. On December 21, 2005, respondents filed a motion to dismiss the complaint "for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted." Petitioner resisted the motion on the merits, but also asked for leave to amend the complaint if it were found to be insufficient in any respect.

The motion was argued on March 2, 2006, but the district court did not issue its ruling until January 24, 2007. App. 28. In the interim, the Board had granted a commutation interview to petitioner. At the conclusion of that interview, on July 28, 2006, the Board unanimously recommended against commutation. Accepting the Board's recommendation, then-Governor Thomas Vilsack denied petitioner's

application on November 30, 2006. *See* App. 16. Subsequently, on January 25, 2007, the district court entered its judgment dismissing petitioner's complaint.

The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court in a published opinion filed on January 11, 2008. App. 1-9. Although that Court acknowledged that "changes to parole procedures may . . . raise *ex post facto* concerns," it insisted that "changes to Iowa's procedures for commutation applications do not." App. 6. Judge Melloy's opinion, joined by both of the other members of the panel that decided the case, rests on the premise that "[t]he unpredictability of a wholly discretionary grant of commutation in Iowa precludes [petitioner] from demonstrating that the changes in Iowa's law raise a 'significant risk' that she will be denied a commutation she otherwise would have received," or establishing that "there is a significant risk her punishment will be longer than it would have been under former Iowa Code Section 902.2." "Accordingly," the opinion concludes, "she cannot make out an *ex post facto* claim." App. 7.

REASONS FOR GRANTING CERTIORARI

"A life sentence in Iowa is a life sentence without the possibility of parole, *absent the governor's commutation of the sentence to a term of years*." App. 3 (emphasis added). Petitioner does not contest the

accuracy of this statement, which served as the major premise of the opinion below. What she does contest is the faulty reasoning that led the Court of Appeals for the Eighth Circuit from this premise to its conclusion: "The unpredictability of a wholly discretionary grant of commutation in Iowa precludes [petitioner] from demonstrating that [certain retroactive] changes in Iowa's law raise a 'significant risk' that she will be denied a commutation that she would have received" under the law that was in effect at the time of her offense, with the consequence that "she cannot make out an *ex post facto* claim." App. 7. On the basis of this conclusion, the Court of Appeals upheld the district court's dismissal of petitioner's complaint – alleging a violation of the *Ex Post Facto* Clause of Article I § 10 of the United States Constitution – without leave to amend.

This Court should review the decision of the Court of Appeals for three interrelated reasons: First, the Court of Appeals' opinion draws a wholly unprincipled distinction between *ex post facto* laws governing state processes leading to possible parole, on one hand, and state processes leading to possible commutation and parole, on the other. Second, the disposition of the instant case by the Court of Appeals is irreconcilable with this Court's disposition of the controversy in *Garner v. Jones*, 529 U.S. 244 (2000). And, third, this case squarely presents a question of law whose correct resolution is of vital importance to a large number of incarcerated men and women.

I. RELEVANT FACTS

Although petitioner was given no opportunity to conduct discovery, a number of facts critical to her case are a matter of public record. It is undisputed that she was sentenced to life imprisonment in 1982, and has been imprisoned for a total of twenty-six years, half of them before and half of them after the pivotal year of 1995. Until 1995, Iowa Code § 902.2 (1981) and the implementing regulations of the Iowa Board of Parole provided that the Board would interview all class "A" felons after they had served five, ten, thirteen, and fifteen years of their respective life sentences, and annually thereafter until either they died or their sentences were commuted and they thus became eligible for release on parole. *See* Iowa Admin. Code § 205-14.2(1)(902) (1989). During each interview, the prisoner was to have "ample opportunity to express views and present materials" to the Board. *Id.* If the Board reached the opinion that a prisoner "should be considered for release on parole," it was directed to "recommend to the governor that the person's sentence be commuted to a term of years." Iowa Code § 902.2 (1981). When a person's sentence was commuted, he or she became eligible for parole under the same rules as applied to other felons. *See id.*

In accordance with Iowa Code § 902.2 (1981), petitioner was interviewed by the Iowa Board of Parole after she had served five years, and again after she had served ten years, of her life sentence. As her complaint alleged, however, when she appeared

before the Board for an interview that was scheduled for her during the summer of 1995, following the completion of her thirteenth year of imprisonment, she was turned away because a "new law" was on the books. Earlier in 1995, Iowa Code § 902.2 had been rewritten in its entirety, and no longer guaranteed any class "A" felon even a single interview, ever, before the Board of Parole. Today, in order to obtain an interview with the Board pursuant to Iowa Code § 902.2 (1995), a class "A" felon must first submit to the governor a formal application requesting that his or her life sentence be commuted. Further, such an application may be filed only once every ten years.

Because she was required to pay more than $4500 of decades-old court costs before filing her first application for commutation, and because she lacked any means of gathering all the information needed to complete the standardized application form, petitioner was unable to request a commutation until she had secured the services of a *pro bono* attorney. Finally, in February 2004, her attorney filed on her behalf an application for commutation that comprised some 120 pages, with attachments. Three months later, the respondent Chair of the Board of Parole sent petitioner's attorney a letter stating that the Board "ha[d] received 80 commutations from the Governor's Office," that "all applications need[ed] to be reviewed within ten years," and that the applications, regardless of their merits, were "being processed in the order as received." Petitioner was "number 80 on the list," so that it could be "several

years" before the Board considered her case. App. 14-15.

In September 2005, petitioner filed this suit – alleging, *inter alia*, that "[respondents'] retroactive application of the present version of § 902.2 to [her] case violates the *Ex Post Facto* Clause of Article I § 10 of the United States Constitution, because it has created a significant risk of prolonging [her] incarceration." Respondents subsequently filed a motion to dismiss, and the matter was argued before the district court in March 2006. Shortly thereafter, without notice to petitioner or her attorneys, petitioner was transported from the women's prison in Wilsonville, Oregon (to which petitioner had been granted a humanitarian transfer in 2004) to the women's prison in Mitchellville, Iowa, where she was granted a lengthy interview by the Board in July 2006. At the conclusion of this interview, the Board unanimously recommended that petitioner's application for a commutation of her sentence be denied, and then-Governor Thomas Vilsack officially denied petitioner's request in November 2006.

Subsequently, in January 2007, the district court entered a judgment dismissing petitioner's complaint without leave to amend. One year later, in January 2008, the Eighth Circuit Court of Appeals affirmed the district court's judgment. The opinion of the Court of Appeals is inconsistent, in both its reasoning and its result, with this Court's opinions and rulings in *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995), and *Garner v. Jones*, 529 U.S. 244 (2000).

II. THE EIGHTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH CONTROLLING DECISIONS OF THIS COURT

A. THE COURT OF APPEALS' OPINION IN THIS CASE DRAWS AN UNPRINCIPLED DISTINCTION BETWEEN AN *EX POST FACTO* LAW THAT GOVERNS A STATE PROCESS LEADING TO POSSIBLE PAROLE AND AN *EX POST FACTO* LAW THAT GOVERNS A STATE PROCESS LEADING TO POSSIBLE COMMUTATION AND PAROLE

1. The *Ex Post Facto* Clause

Some 220 years ago, James Madison wrote that "*ex post facto* laws . . . are contrary to the first principles of the social compact, and to every principle of sound legislation." THE FEDERALIST No. 44, at 301 (James Madison) (James E. Cooke ed., 1961). Madison's view is reflected in two clauses found in the original Constitution of the United States of America. Article I § 10 – the constitutional provision at issue in this case – declares, in part, that "No State shall . . . pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts." The first and second of the quoted prohibitions have explicit counterparts in Article I § 9, which limits the power of the national government by declaring that "No Bill of Attainder or *ex post facto* Law shall be passed."

2. Relevant Case Law Interpreting the *Ex Post Facto* Clause

Despite the apparent precision of the command that "[n]o state shall . . . pass any . . . *ex post facto* law," this Court has been sharply divided in a number of decisions testing the outer limits of the clause. All parties to this litigation and both of the lower courts appear to agree, however, that two relatively recent decisions of the Court provide the proper starting point for an analysis of the present case. The two decisions are *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995) and *Garner v. Jones*, 529 U.S. 244 (2000).

a. *Morales*

Morales involved an *ex post facto* claim by a prisoner who had been convicted of murdering his girlfriend, sentenced to life in prison, released on parole, convicted of murdering an elderly woman whom he had married after his release, and sentenced to a term of fifteen years to life for the second murder. Under the California law that was in effect at the time of this second murder, the Board of Prison Terms would have been obliged to grant the prisoner an initial hearing to determine his suitability for parole after he had served ten years of his sentence, and to grant him another suitability hearing annually thereafter. In the year following the relevant murder, however, the law was amended to provide that, once a prisoner who had committed more than one homicide

had received his or her initial suitability hearing and been denied parole, the Board could extend the intervals between his or her subsequent hearings from just one year to as long as three years. Upon finding that "the amendment applie[d] only to a class of prisoners for whom the likelihood of release on parole [was] quite remote," and that "the Board retain[ed] the authority to tailor the frequency of subsequent suitability hearings to the particular circumstances of the individual prisoner," this Court concluded that the change in the applicable law "create[d] only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes." As a consequence, the amended law did not violate the *ex post facto* clause. *Id.* at 510, 511, 513.

b. *Garner v. Jones*

Garner v. Jones, which was decided approximately five years after *Morales*, involved an *ex post facto* claim by a prisoner who had committed a second murder after he had escaped from prison while serving a life sentence for an earlier murder. At the time of the prisoner's second crime, the Rules of the Georgia Board of Pardons and Paroles provided that an inmate who had initially been denied parole would be reconsidered for parole every three years. After the prisoner had begun to serve his second sentence, however, the Board amended its Rules to provide that the intervals between reconsideration hearings could be up to eight years in length. Subsequently, the Board scheduled a reconsideration hearing for the

prisoner on a date eight years after his last previous hearing, and he responded by suing the members of the Board under 42 U.S.C. § 1983. The district court denied his motion for discovery and entered summary judgment for the defendants, but the Eleventh Circuit Court of Appeals reversed, distinguishing *Morales* and finding that "retroactive application of the change in the law was necessarily an *ex post facto* violation." *Garner v. Jones*, 529 U.S. at 247-249.

In *Garner v. Jones*, this Court identified the critical question as "whether the amended Georgia Rule create[d] a significant risk of prolonging respondent's incarceration," and found that "[t]he requisite risk [was] not in the framework of [the] amended Rule," and "ha[d] not otherwise been demonstrated on the record." *Id.* at 251. Justice Kennedy's opinion for this Court rejected the Court of Appeals' "supposition" that the amendment to the challenged Rule necessarily would result in the extension of some prisoners' periods of incarceration. This Court held, as a consequence, that the complaining prisoner could not prevail in his suit unless he succeeded in proving that "as applied to his own sentence, the law created a significant risk of increasing his punishment." *Id.* at 255. Then, in a paragraph that is directly relevant to the issues in the present case, this Court concluded as follows:

> The Court of Appeals' analysis failed to reveal whether the amendment of [the challenged Rule], in its operation, created a significant risk of increased punishment for

> respondent. Respondent claims he has not been permitted sufficient discovery to make this showing. The matter of adequate discovery is one for the Court of Appeals or, as need be, for the District Court in the first instance. The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion. *Id.* at 256.

3. The Erroneous Dismissal of This Case

Because the district court dismissed the complaint in the present case even before an answer had been filed, petitioner has not been given any opportunity for discovery. The Court of Appeals upheld the judgment dismissing the complaint on the ground that "any form of relief for [petitioner] depends on a speculative, unpredictable, and wholly discretionary grant of clemency by the governor." App. 5. The Court of Appeals reasoned that "[t]he unpredictability of a wholly discretionary grant of commutation in Iowa precludes [petitioner] from demonstrating that the changes in Iowa law raise a 'significant risk' that she will be denied a commutation she otherwise would have received," so that "she cannot make out an *ex post facto* claim." App. 7. In support of this proposition, the Court of Appeals cited a sentence in *Morales* that characterizes the change in the law under review in that case as having created "only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of

punishment for covered crimes . . . " – *i.e.*, crimes of prisoners who had taken more than one life. *Id.* (citing *Morales*, 514 U.S. at 509).

An examination of the three paragraphs following this language in the *Morales* opinion reveals that petitioner's situation is much more similar to that of the prisoner in *Garner v. Jones* than to that of the prisoner in *Morales*. First, this Court reasoned in *Morales* that "the [challenged] amendment applie[d] only to a class of prisoners for whom the likelihood of release on parole [was] quite remote." Second, it emphasized that the amendment applied, by its own terms, only when the Board specifically determined, after a hearing, "that the prisoner was unsuitable for parole," and that it was not reasonable to expect parole to be granted during the following years. And, finally, it observed that "the Board retain[ed] the authority to tailor the frequency of subsequent hearings to the particular circumstances of the individual prisoner." *Id.* at 511.

The contrast between the change in the law at issue in *Morales* and the change in the law at issue in the instant case is striking. Before 1995, Iowa law provided that *every* prisoner serving a life sentence had the right to a hearing before the Board of Parole *every* year after he or she had been imprisoned for fifteen years. Since 1995, Iowa law has provided that *no* prisoner serving a life sentence has a right to a hearing before the Board of Parole at *any* time unless he or she first succeeds in doing what is impossible for many: fulfilling the conditions precedent to filing,

and actually completing and filing, an application for a commutation in the office of the governor. Even if a particular prisoner manages to file a petition and thus to qualify for a hearing, the Board has no authority to "tailor the frequency of subsequent hearings to the particular circumstances of the individual prisoner," who cannot request a new hearing until ten years after completing and filing the application necessary to request the prior one.

The Court of Appeals did not engage in any comparison of the effects of the law challenged in *Morales* with the effects of the Iowa law challenged in this case. In fact, however, the challenged Iowa law has had, and continues to have, an enormous impact both on petitioner's own opportunities and on the opportunities of an entire class of prisoners to seek parole. The Court of Appeals saw no need to engage in any real analysis of petitioner's allegations because, in its view, "[her] claim does not hinge on the availability of parole, but on the availability of commutation – the only means by which she might become eligible for parole." App. 6.

No one denies, of course, that the reason petitioner is seeking to enforce her right to the regular interviews by the Iowa Board of Parole she was guaranteed under the law that was in effect until 1995 is that an interview by the Board is a statutory prerequisite to her securing a commutation from the governor. Without a hearing before the Board, her chances for commutation are zero. And, without a commutation by the governor, her chances for parole

are zero. Before 1995 the Board had, and today it still has, both the first and the final say in whether and when a given prisoner serving a life sentence should be released on parole. It defies logic to assert that, *as a matter of law*, petitioner cannot demonstrate that denying her the annual Board interviews to which she currently would be entitled under the pre-1995 law does not pose any "significant risk" of prolonging her incarceration. *In fact*, denying her these interviews deprives her of an annual opportunity to secure the commutation that would, if granted, almost certainly lead to her subsequent parole.

In a lengthy footnote in petitioner's case, the Court of Appeals explained its reasons for concluding that the discretionary nature of the Iowa commutation process absolutely precludes petitioner from demonstrating that the drastic limitation of her opportunities to secure the Board's support for a commutation of her sentence has created a "significant risk" of prolonging her incarceration:

> It is difficult to speak generically about differences between parole and commutation, and it is necessary to focus specifically on the law at issue in a given case. This is because each state may have slightly different degrees of discretion or guidance imposed on its parole board's or governor's exercise of power, and the relative degree of discretion or guidance factors largely into determining whether a change in a relevant law create [*sic.*] a significant risk of increasing a defendant's punishment. . . . In the present case,

> there are no statutory "shalls" restricting the Iowa governor's discretion or providing benchmarks by which a reviewing court might conduct an analysis of the likelihood that changes in the law will create a significant risk of increased punishment. App. 6.

In assessing the soundness of the Court of Appeals' reasoning, this Court should bear in mind that the "presence of discretion does not displace the protections of the *Ex Post Facto* Clause. . . ." *Garner v. Jones*, 529 U.S. at 253. This Court should also take note of the fact that the amended Iowa law that is challenged in this case – and that is now entitled "Commutation procedure for class 'A' felons" – does contain some "shalls":

> . . . Upon receipt of a request for commutation [from or on behalf of a class "A" felon], the governor *shall* send a copy of the request to the Iowa board of parole for investigation and recommendations as to whether the person should be considered for commutation. The board *shall* conduct an interview of the class "A" felon and *shall* make a report of its findings and recommendations to the governor.

Iowa Code § 902.2 (1995) (Emphasis added).

In other words, while the governor's discretion in making the decision whether to grant or deny a request for the commutation of the life sentence of a particular class "A" felon cannot be limited by the Iowa legislature, the legislature *has* established

conditions precedent to the governor's disposition of such a request. It has instructed the governor to forward the request to the Board of Parole, and it has instructed the Board of Parole to interview the class "A" felon and to "make a report of its findings and recommendations to the governor" with respect to whether the felon should be considered for commutation. *Id.* Both before and after 1995, the process for commutation has begun with the Board, the governor has been authorized to act only after receiving the Board's findings and recommendations, and the Board has made the final decision concerning whether and when a class "A" felon whose sentence has been commuted will actually be released on parole. Both then and now, the Board of Parole – in deciding whether to grant parole to a class "A" felon whose sentence has been commuted to a term of years, *and* in deciding whether to grant parole to someone who has automatically become eligible for it due to the simple passage of time – has had the same kind of broad discretionary authority as resides in the governor.

Under Iowa law, a class "A" felon has always become eligible for parole immediately upon the commutation of his or her sentence to a term of years. In 1981, Iowa Code § 906.4 provided that the Board of Parole was to release any person eligible for parole if it determined there was a "reasonable probability" that "such person . . . [was] able and willing to fulfill the obligations of a law-abiding citizen. . . ." Today, Iowa Code § 906.4 continues to provide that the

Board of Parole should release any person eligible for parole if it determines there is a "reasonable probability" that "the person is able and willing to fulfill the obligations of a law-abiding citizen. . . ."

In short, both before and after 1995, the results of all three stages of the process for the commutation and parole of a class "A" felon under Iowa law – first, consideration by the Board of Parole; second, consideration by the governor; and, third, renewed consideration by the Board of Parole – have been characterized by the exercise of broad discretion. The one feature of the scheme that has been altered, and dramatically, is the frequency of the occasions on which the governing statute, Iowa Code § 902.2, calls upon the Board of Parole *and* the governor to exercise the discretion that resides in them. It defies reason to conclude, as the lower courts did, that the change in this frequency from once every year under the pre-1995 statute to no more often than once every ten years under the post-1995 statute *cannot* – as a matter of law – have created a "significant risk" of prolonging the incarceration of at least some class "A" felons who were convicted of crimes committed while the earlier statute was still in effect.

B. THE COURT OF APPEALS' DISPOSITION OF THIS CASE CANNOT BE RECONCILED WITH THIS COURT'S DISPOSITION OF *GARNER V. JONES*, WHICH REQUIRES A REVERSAL AND REMAND

The definitive case on the question of "whether the retroactive application of a [state] law permitting the extension of intervals between parole considerations violates the *Ex Post Facto* Clause" is *Garner v. Jones*, 529 U.S. 244, 246 (2000). Both *Garner v. Jones* and this Court's earlier decision in *California Dep't of Corrections v. Morales* are discussed in detail *supra*. *Garner v. Jones* deserves further attention, however, because this Court ultimately disposed of that case by reversing a judgment in favor of Jones, a double murderer, but remanding for further proceedings. The purpose of the remand was to resolve the question whether Jones had been allowed "sufficient discovery to make [the required] showing" that an amendment to a rule of the Georgia Board of Pardons and Paroles had, "in its operation, created a significant risk of increased punishment for [him]." *Id.* at 257. Petitioner in the present case is seeking similar immediate relief: a reversal of the judgment against her and a remand to the district court, so that she will have the opportunity to amend her complaint, conduct discovery, and demonstrate that, "in its operation," Iowa Code § 902.2 (1995) has "created a significant risk of increased punishment for [her]."

At the outset, it should be noted that Justice Souter's dissenting opinion in *Garner v. Jones* makes a point that deserves further attention – and, perhaps, clarification – by this Court. Justices Souter, Stevens, and Ginsburg read this Court's prior decisions as holding that "[a] change in parole policy violates the *Ex Post Facto* Clause if it creates a . . . substantial risk that the *class affected by the change* will serve longer sentences as a result." *Id.* at 260 (Souter, J., dissenting) (emphasis added). Indeed, there is a respectable argument in favor of the proposition that it is the effect a retroactively applied law has on an entire class of persons, rather than solely the effect it has on the litigant challenging the law, which should be determinative of the merit of an *ex post facto* challenge. By their terms, Article I § 9 and Article I § 10 of the U.S. Constitution prohibit Congress and the states, respectively, from passing any *ex post facto* laws. On the basis of the language of the two constitutional clauses banning all *ex post facto* legislation, one might conclude that their blanket prohibitions were designed to insure the regularity and integrity of governmental processes as a safeguard for all – rather than simply to protect particular individuals from suffering more serious and demonstrable disadvantages than those suffered by other members of their class as a result of retroactive changes in the law.

Nevertheless, this Court held in *Garner v. Jones* that the decisive issue was whether the rule Jones challenged – a retroactively applied rule that the

Georgia Board of Pardons and Paroles used to extend the intervals between parole reconsiderations for selected prisoners – "create[d] a significant risk of prolonging [*his*] incarceration." *Id.* at 251. Justice Kennedy, writing for this Court, expressed some skepticism that Jones would actually be able to demonstrate that the new rule had created any "significant risk" of increasing his punishment for the two murders he had committed (with an escape from prison between the two). This Court noted that the Georgia Board exercised its discretion to extend the intervals between parole hearings for a particular prisoner only after the Board had determined that "it [was] not reasonable to expect that parole wo ıd be granted [to him or her] during the intervening years." *Id.* at 254. It noted, in addition, that the Board granted "expedited consideration" to a prisoner whenever new information or special circumstances warranted it. *Id.* at 257. Even so, this Court remanded the case to the lower courts to allow them to determine whether Jones had been given an adequate opportunity to discover the facts necessary to make the required demonstration. *Id.*

Despite the lesson of *Garner v. Jones*, the Court of Appeals in the present case did not remand to the district court, but instead simply affirmed the judgment dismissing petitioner's complaint. App. 27. Throughout the proceedings below, petitioner had formally and properly requested that she be granted leave to amend her complaint, the opportunity to conduct discovery, and the right to proceed to trial.

She remains confident that if she is given the right to try her case she will succeed in proving – on the basis of facts that she has known for years, facts that emerged during her 2006 interview with the Iowa Board of Parole, and facts she will be able to elicit through discovery – that the denial to her of annual interviews with the Board of Parole has not only created a significant risk of prolonging her incarceration but has already prolonged it. All she needs is the opportunity that would be created by a reversal and remand: the disposition this Court ordered in *Garner v. Jones*.

In 2006, petitioner finally was given a formal interview by the Iowa Board of Parole, some fourteen years after her last previous interview, but only after she had filed this lawsuit. Although the Board unanimously recommended against a commutation for her, she is optimistic that she will prevail next time. From the 2006 interview, she and her attorney gained much valuable information, including the fact that the Iowa Board of Corrections had recommended that the commutation be granted to her. They also learned that the chief concern of the Board and the Governor regarding petitioner's application for commutation was her "lack of acceptance of full responsibility for the crime" of which she was convicted. *See* Memorandum re: Sherryl Snodgrass, by Elizabeth Robinson, Chair of the Iowa Board of Parole, November 30, 2006.

In fact, contrary to his testimony at their joint trial in 1982, petitioner's codefendant now admits he

shot the gun and wielded the knife that killed petitioner's husband. (For an account of the trial testimony of petitioner and her codefendant, see *State v. Snodgrass*, 364 N.W. 2d 472). Whenever petitioner is able to secure another interview with the Board, her attorney will provide the Board with new evidence in support of petitioner's account of what actually occurred on the night of the murder. Petitioner believes herself to be entitled to such an interview now, and annually hereafter – until the Iowa Board of Parole and the Governor of Iowa have agreed to her release on parole.

III. THE QUESTION PRESENTED IN THIS CASE IS A QUESTION OF LAW WHOSE CORRECT RESOLUTION IS VITALLY IMPORTANT TO A LARGE NUMBER OF INCARCERATED MEN AND WOMEN

In February of this year, the Pew Center on the States issued a long-awaited report that captured headlines around the nation. This report, *One in 100: Behind Bars in America 2008* (The Pew Charitable Trusts (2008)), includes the following findings:

> Three decades of growth in American's prison population has quietly nudged the nation across a sobering threshold: for the first time, more than one in every 100 adults is now confined in an American jail or prison. . . .
>
> [C]urrent prison growth is not driven primarily by a parallel increase in crime, or a

> corresponding surge in the population at large. Rather, it flows principally from a wave of policy choices that are sending more lawbreakers to prison and, through popular "three-strikes" measures and other sentencing enhancements, keeping them there longer. . . .
>
> The politics of crime fighting have made most lawmakers understandably wary of advocating a diverse punishment strategy. These are politicians who have seen their careers torpedoed by opponents who used a lone vote, or even a comment, to create a dreaded "soft-on-crime" image at election time. . . .

Id. at 3, 17.

It would not be appropriate, of course, for this Court to enter into the ongoing public debate concerning the policies and practices our nation and states should adopt as they carry out their responsibilities to deter and punish criminal activity. Among this Court's most important functions, however, is that of enforcing the provisions of the U.S. Constitution – including the two clauses that were inserted in that document to protect individual Americans from the vindictive urges that may be reflected in a legislature's enactment of *ex post facto* legislation. This case offers the Court an excellent opportunity to elucidate the circumstances under which retroactive limitations on state prisoners' rights to parole and commutation hearings violate the *Ex Post Facto* Clause of Article I § 10.

As the Court of Appeals correctly observed, "a life sentence in Iowa is a life sentence without the possibility of parole, *absent the governor's commutation of the sentence to a term of years*." App. 3 (emphasis added). In fact, a life sentence in Iowa has always carried a real possibility of parole. Between 1963 and 1969, Iowa Governor Harold Hughes commuted twenty-nine sentences of life imprisonment to terms of years; and during the period from 1969 to 1983, Governor Robert Ray granted commutations of their life sentences to twenty additional prisoners. Although Governor Terry Branstad was in office from 1983 to 1999, he granted only two such commutations, both of which preceded the revision of Iowa Code § 902.2 in 1995. Finally, Governor Thomas Vilsack, who served from 1997 to 2007, granted seven commutations of life sentences during his tenure. *See* Walt Shotwell, "Cityview Online (Guest Commentary)," http://dmcityview.com/archives/2007/10oct/10-18-07/guest.shtml.

As the statistics cited above demonstrate, prisoners serving life sentences under the jurisdiction of the Iowa Department of Corrections still have a meaningful chance of obtaining a commutation and their eventual freedom *if* they can clear all the hurdles the 1995 legislation has placed in front of them. Rather ironically, however, the chances may be much less favorable for those who have already been imprisoned for many years than for the more recently convicted.

An excerpt from petitioner's opening brief in the Court of Appeals explains the point:

> Under the terms of amended § 902.2, a person serving a life sentence now must affirmatively request a commutation by complying with all the conditions precedent that are listed in the "Official Application for Executive Clemency," and then completing that Application and submitting it to the Governor's Office. The completion of the required Application, especially by Class "A" felons who were convicted and sentenced to life imprisonment a dozen or more years ago, can be a forbidding task. Because a disproportionate number of the inmates serving life sentences are impecunious, many of them will not be able to pay, and therefore will not be able to prove that they have paid, all the "court costs, fines and restitution" for which they are responsible. Further, because they lack access to the Internet and enjoy only limited and costly access to telephone services, virtually all of them will find it difficult to locate, let alone secure letters of recommendation from, the [sentencing judges in their cases, the county sheriffs in their counties of conviction or current residence, their ministers, their present and former employers, and other responsible persons in the community who can attest to their moral character]. . . .
>
> In fact, although [petitioner] exerted considerable effort over a period of years to complete an Application, she was unable to

> do so – in large part, because of the difficulty of meeting the requirements noted above – until she secured *pro bono* counsel in 2002. . . .

Until the present version of Iowa Code § 902.2 became effective in 1995, the Iowa Board of Parole was statutorily required to interview every person serving a life sentence "regularly" – and had bound itself to do so *annually* – once the prisoner had been incarcerated for fifteen years. According to the Iowa Department of Human Rights, Division of Criminal and Juvenile Justice Planning, the number of prisoners serving life sentences under the jurisdiction of the Iowa Department of Corrections rose from 198 in 1986 to 595 on June 30, 2007. Of the 595 serving life sentences as of last June 30, thirty-six were women. Twenty of these thirty-six women, including petitioner, were committed prior to July 1, 1995. The great majority of these women would now be entitled to "annual" interviews by the Iowa Board of Parole if Iowa Code § 902.2 had not been rewritten in its entirety and the new law applied retroactively to them. Petitioner is prepared to demonstrate that, at the least, the retroactive application of the amended law to her has created a significant risk of prolonging, and almost certainly already has prolonged, her incarceration – in violation of Article I § 10 of the U.S. Constitution.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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App. 1

Snodgrass v. Robinson,
No. 07-1463 (8th Cir. 01/11/2008)

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 07-1463

2008.C08.0000035<http://www.versuslaw.com>

January 11, 2008

SHERRYL ANN SNODGRASS, PLAINTIFF-APPELLANT, JULIANN LAWRENCE, PLAINTIFF, V. ELIZABETH ROBINSON, CHAIR OF THE IOWA BOARD OF PAROLE, IN HER INDIVIDUAL AND OFFICIAL CAPACITY; KAREN MUELHAUPT, VICE CHAIR OF THE IOWA BOARD OF PAROLE, IN HER INDIVIDUAL AND OFFICIAL CAPACITY; RICHARD S. BOARDWELL, MEMBER, IOWA BOARD OF PAROLE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; CURTIS S. JENKINS, MEMBER, IOWA BOARD OF PAROLE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; BARBARA BINNIE, MEMBER, IOWA BOARD OF PAROLE, IN HER INDIVIDUAL AND OFFICIAL CAPACITY; IOWA BOARD OF PAROLE; AND CHESTER J. CULVER, GOVERNOR OF IOWA, DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Southern District of Iowa.

The opinion of the court was delivered by: Melloy, Circuit Judge.

Submitted: November 1, 2007.

Before MELLOY, COLLOTON, and BENTON, Circuit Judges.

State prisoner Sherryl Ann Snodgrass filed suit alleging that the Iowa Board of Parole ("the Board"), the Board's members, and the governor of Iowa violated her constitutional rights by applying laws and regulations governing sentence commutation requests even though the laws were passed after her conviction. She alleges these acts violated the ex post facto clause of the United States Constitution and caused a deprivation of her Fifth and Fourteenth Amendment due process rights. U.S. Const. Art. I, § 10, cl. 1; Amend. V; Amend. XIV, § 1. The district court[1] granted a motion to dismiss, finding commutation by the governor in Iowa to be an act of grace unrestricted by substantive laws or rules. The district court concluded that the speculative possibility of a lost opportunity for a commutation could not serve as the basis for a state's ex post facto violation and that Snodgrass had no liberty interest in an act of grace by the governor. Accordingly, the district court held Snodgrass had not stated a cause of action for any constitutional violations. We affirm.

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[1] The Honorable Ross A. Walters, United States Magistrate Judge for the Southern District of Iowa, sitting by consent of the parties in accordance with 28 U.S.C. § 636(c).

I. Background

Snodgrass and her lover were convicted of first degree murder for the 1981 slaying of Snodgrass's husband. The details of the offense and the state court proceedings are described in *State v. Snodgrass*, 346 N.W.2d 472 (Iowa 1984). First degree murder is a class A felony in Iowa, Iowa Code § 707.2 (1981 and 2007), and carries a mandatory life sentence. *Id.* § 902.1. Now, as it did in 1981, Iowa precludes a grant of parole to a person serving a life sentence. *Id.* In other words, a life sentence in Iowa is a life sentence without the possibility of parole, absent the governor's commutation of the sentence to a term of years. *Id.* (providing that if the governor commutes a prisoner's life sentence to a term of years, the prisoner becomes eligible for parole).

The Iowa constitution grants the governor the power to commute sentences, "subject to such regulations as may be provided by law." Iowa Const. Art. IV, § 16. Iowa, however, has passed no substantive restrictions on the governor's ability to commute sentences, and, in fact, the Iowa Code provides, "The power of the Governor . . . to grant a . . . commutation of sentence . . . shall not be impaired." Iowa Code § 914.1 (2007). For the purpose of our analysis, then, we must view the Iowa governor's power to commute sentences as substantively unfettered. *Lyon v. State*, 404 N.W.2d 580, 583 (Iowa Ct. App. 1987) ("No substantive predicates are placed upon the governor's discretion in granting a commutation of sentence.").

Although the governor's authority to commute sentences is not restricted by any substantive laws, the Iowa Code does provide that the Board shall review certain prisoners' files, interview prisoners, and make commutation recommendations to the governor. Iowa Code § 902.2 (2007). At the time of Snodgrass's offense and conviction, the Iowa Code provided that the Board was to interview class A felons within five years of their incarceration "and regularly thereafter." Iowa Code § 902.2 (1981). Applicable regulations added detail to this general requirement, providing for interviews of class A felons at intervals of five, ten, thirteen, and fifteen years post-confinement, and annually thereafter. Iowa Admin. Code § 205-14.2(1)(902) (1989).

In 1995, well after Snodgrass's 1981 conviction, the Iowa legislature amended Iowa Code § 902.2 to provide that a Class A felon serving a life sentence could apply to the governor for commutation "no more frequently than once every ten years." Iowa Code § 902.2 (1995). This amended code section also provides that the governor is to forward such applications to the Board to enable the Board to make recommendations. *Id.* Finally, the Board's recommendations have never been binding on the governor, and section 902.2 in no way restricts the power of the Director of the Iowa Department of Corrections, who "may make a request to the governor that a person's sentence be commuted to a term of years at any time." Iowa Code § 902.2 (2007).

In support of her claims, Snodgrass alleges additional facts regarding the practices of the Board, the history of her applications with the Board, and the governor's denial of a recent commutation application from Snodgrass. She argues on appeal that the district court improperly granted the state's motion to dismiss and failed to accept the facts alleged in her complaint and the reasonable inferences from those facts. We need not delve into her factual allegations. At the end of the day, any form of relief for Snodgrass depends on a speculative, unpredictable, and wholly discretionary grant of clemency by the governor. We agree with the district court that Snodgrass cannot state an ex post facto or due process violation based on the application of the challenged laws.

II. Ex Post Facto

"[T]he focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' nor . . . on whether an amendment affects a prisoner's '*opportunity* to take advantage of provisions for early release,' but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 506 n. 3 (1995) (citation omitted). Simply put, not every change in the law raises ex post facto concerns. The changed law must create a "significant risk" of increasing the offender's punishment. *See Garner v. Jones*, 529 U.S. 244, 255 (2000) (announcing the rule that, to prove an ex post facto

violation related to changes in *parole* procedures, an inmate must, "show that as applied to his own sentence the law created a *significant risk* of increasing his punishment") (emphasis added).

Here, Snodgrass's claim does not hinge on the availability of parole, but on the availability of a commutation – the only means by which she might become eligible for parole.[2] Whereas changes to parole procedures may, in some circumstances raise ex post facto concerns, changes to Iowa's procedures for commutation applications do not. *See id.* at 250

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[2] It is difficult to speak generically about differences between parole and commutation, and it is necessary to focus specifically on the law at issue in a given case. This is because each state may have slightly different degrees of discretion or guidance imposed on its parole board's or governor's exercise of power, and the relative degree of discretion or guidance factors largely into determining whether a change in a relevant law create a significant risk of increasing a defendant's punishment. In *Garner*, for example, the Court described a Georgia parole board as holding "broad discretion." *Garner*, 529 U.S. at 253. That discretion was not limitless, however, and the controlling state statute provided guidance for the parole board's consideration, repeatedly stating what factors the parole board "'shall'" and "'shall not'" consider. *Id.* at 252-53 (quoting Ga. Code Ann. § 42-9-42(c)). The Court ultimately remanded the case for further development because the record was not sufficient to conduct "a more rigorous analysis of the level of risk [of increased punishment] created by the change in law." *Id.* at 255. In the present case, there are no statutory "shalls" restricting the Iowa governor's discretion or providing benchmarks by which a reviewing court might conduct an analysis of the likelihood that changes in the law will create a significant risk of increased punishment.

("Retroactive changes in laws governing parole of prisoners, in some instances, may be violative of [the ex post facto clause]."). This is because most parole procedures are distinct from the highly personal, policy oriented, and legislatively unchecked authority of the Iowa governor to grant sentence commutations.

The unpredictability of a wholly discretionary grant of commutation in Iowa precludes Snodgrass from demonstrating that the changes in Iowa's law raise a "significant risk" that she will be denied a commutation she otherwise would have received. As such, she cannot demonstrate there is a significant risk her punishment will be longer than it would have been under former Iowa Code Section 902.2. Accordingly, she cannot make out an ex post facto claim. *Morales*, 514 U.S. at 509 (stating that where the changed law gives rise to "only the most speculative and attenuated possibility of . . . increasing the measure of punishment . . . such conjectural effects are insufficient under any threshold we might establish under the ex post facto clause").

II. Due Process

To state a due process violation, Snodgrass must first identify a protected liberty interest. She asserts a liberty interest in familial association and claims that the changed law will increase her sentence thereby depriving her of contact with her family. The proper focus, however, is not on whether Snodgrass has some liberty interest that is affected by her

continued incarceration. Her criminal acts and lawful conviction caused her incarceration and extinguished or limited countless liberty interests. Those liberty interests were removed under the myriad procedural protections attendant to arrest and trial. The proper focus in this case is on whether she has a liberty interest in the grant of a sentence commutation from the Iowa governor – the only action that can in any manner shorten her term of incarceration.

On this question, the law is clear: "no liberty interest . . . is created unless the state statute or regulation involved uses mandatory language and imposes substantive limits on the discretion of state officials." *Bagley v. Rogerson*, 5 F.3d 325, 328-29 (8th Cir. 1993); *see also*, *Marshall v. Mitchell*, 57 F.3d 671, 672-73 (8th Cir. 1995) (holding that a Missouri parole scheme that gives officials "virtually unlimited discretion" to grant parole does "not create a liberty interest protected by the due process clause of the Fourteenth Amendment"). Likewise, the Supreme Court has refused to recognize a prisoner's liberty interest in discretionary commutations based on a statute that has "no definitions, no criteria, and no mandated shalls." *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981) (citations omitted); *see id.* at 464 (interpreting a Connecticut statute and holding that "an inmate has no constitutional or inherent right to commutation of his sentence."). Without a liberty interest in a commutation, there can be no due process violation related to changes in the procedure surrounding such a commutation. *See id.* at 463

("Plainly, however, the underlying right must have come into existence before it can trigger due process protection."). As we stated in *Bagley*, "If a state law gives . . . the right to a certain outcome in the event of the occurrence of certain facts, [there is] a right, by virtue of the Fourteenth Amendment, to whatever process is due in connection with the determination of whether those facts exist." *Bagley*, 5 F.3d at 328. Here, the unfettered discretion vested in the governor gives no prisoner a "right to a certain outcome in the event of the occurrence of certain fact." As such, Iowa prisoners have no liberty interest in commutations, just like the Missouri prisoners had no liberty interest in the grants of parole in the scheme examined in *Marshall*.

To the extent Snodgrass argues her asserted liberty interest is an absolute right to interviews with the Board as frequently as was permitted under Iowa law at the time of her offense, her arguments are misplaced. Such an argument confuses the liberty interested to be protected with the procedure provided for its protection.

We affirm the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

SHERRYL ANN SNODGRASS and JULIANN LAWRENCE, Plaintiffs, v. ELIZABETH ROBINSON, Chair of the Iowa Board of Parole, in her individual and official capacity; KAREN MUELHAUPT, Vice Chair of the Iowa Board of Parole, in her individual and official capacity; RICHARD S. BORDWELL, Member, Iowa Board of Parole, in his individual and official capacity; CURTIS S. JENKINS, Member, Iowa Board of Parole, in his individual and official capacity; BARBARA BINNIE, Member, Iowa Board of Parole, in her individual and official capacity; IOWA BOARD OF PAROLE; and CHESTER J. CULVER, Governor of Iowa, Defendants.	NO. 4:05-cv-00520-RAW RULING ON DEFENDANTS' MOTION TO DISMISS

Before the Court following hearing is defendants' resisted Motion to Dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P.

12(b)(6). On a motion to dismiss the Court accepts as true all of the allegations of the Complaint and draws all reasonable inferences in favor of the nonmovant plaintiffs. *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 555 (8th Cir. 2006). A Rule 12(b)(6) motion should not be granted unless it appears beyond a reasonable doubt the plaintiff can prove no set of facts entitling him or her to relief. *Young v. City of St. Charles, MO,* 244 F.3d 623, 627 (8th Cir. 2001). While the Court takes as true the factual allegations of the Complaint, "the complaint must contain facts which state a claim as a matter of law and must not be conclusory." *Briehl v. General Motors Corp.*, 172 F.3d 623, 627 (8th Cir. 1999); *see Quinn v. Ocwen Federal Bank FSB,* 470 F.3d 1240, 1244 (8th Cir. 2006) ("'complaint must contain sufficient facts, as opposed to mere conclusions, to satisfy the legal requirements of the claim,'" quoting *DuBois v. Ford Motor Credit Co.*, 276 F.3d 1019, 1022 (8th Cir. 2002)). In addition to the Complaint the Court may consider matters of public record, of which judicial notice may be taken, and "materials necessarily embraced by the pleadings" without converting the motion to one for summary judgment. *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (quoting *Piper Jaffray Cos. v. National Union Fire Ins. Co.*, 967 F.Supp. 1148, 1152 (D.Minn. 1997)); *see Manion v. Nagin,* 394 F.3d 1062, 1065 n.3 (8th Cir.), *cert. denied,* 545 U.S. 1128 (2005); *Stahl v. U.S. Dept. of Agriculture,* 327 F.3d 697, 700 (8th Cir. 2003); *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 697 n.4 (8th Cir. 2003); *Faibisch v. University of Minnesota,*

304 F.3d 797, 802 (8th Cir. 2002); *Hatch v. TIG Ins. Co.*, 301 F.3d 915, 916 n. 2 (8th Cir. 2002).

I. Factual, Procedural and Legal Background

The Complaint together with public record and other material integral to it show the following. Plaintiff Sherryl Snodgrass is serving a life sentence following a 1982 conviction for first-degree murder, a class "A" felony under Iowa law. Iowa Code § 707.2 (1981 & 2005).[1] Plaintiff Juliann Lawrence is Ms. Snodgrass' daughter. Defendants are members of the Iowa Board of Parole (the Board), the Board itself and Governor Culver.[2]

Ms. Snodgrass is not eligible for release on parole unless her sentence is commuted to a term of years by the Governor. Iowa Code § 902.1 (1981 & 2005). At the time of the offense, the Iowa Code provided as follows with respect to the Board's review of class "A" felons for possible commutation:

> . . . The board shall interview a class "A" felon within five years of his or her confinement and regularly thereafter. If in the opinion of the board, the person should be considered

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[1] The circumstances of the offense are described in *State v. Snodgrass*, 346 N.W.2d 472, 473-74 (Iowa 1984).

[2] The Governor is sued only in his official capacity. The Complaint names former Governor Thomas J. Vilsack who has recently been succeeded by Governor Culver. By rule the latter should be substituted. Fed. R. Civ. P. 25(d)(1).

> for release on parole, the board shall recommend to the governor that the person's sentence be commuted to a term of years. If the person's sentence is so commuted, the person shall be eligible for parole as provided in chapter 906.

Iowa Code § 902.2 (1981). The Complaint alleges: "Prior to 1995 the [Board's] policy was in fact to review applications for commutation by class 'A' felons every year, after they had been incarcerated for fifteen years." (Complaint ¶ 14).[3] Ms. Snodgrass was called before the Board in 1995 at which time she was told the Board could not review her case because a "new law" was in effect.[4]

The "new law" was a 1995 revision to § 902.2 which substituted the following for the former version:

> . . . A person who has been sentenced to life imprisonment under section 902.1 may, no more frequently than once every ten years, make an application to the governor requesting that the person's sentence be commuted to a term of years. The director of the Iowa department of corrections may make a request to

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[3] *See* Iowa Admin. Code § 205-14.2(1)(902) (1989) which provided for class "A" felon interviews at intervals of five, ten, thirteen and fifteen years from commitment and annually thereafter.

[4] The Board's administrative rules now permit Board reviews of the records of class "A" felons at its discretion. Iowa Admin. Code § 205-14.2(902) (2006).

> the governor that a person's sentence be commuted to a term of years at any time. Upon receipt of a request for commutation, the governor shall send a copy of the request to the Iowa board of parole for investigation and recommendations as to whether the person should be considered for commutation. The board shall conduct an interview of the class "A" felon and shall make a report of its findings and recommendations to the governor.

1995 Iowa Acts, ch. 128, § 1 codified at Iowa Code § 902.2 (2005).[5]

On February 5, 2004 Ms. Snodgrass submitted a clemency petition seeking commutation of her sentence. (Pl. Resistance at 5). On May 13, 2004 Board Chair Elizabeth Robinson wrote to one of Ms. Snodgrass' attorneys advising:

> . . . [T]he Parole Board has received 80 commutation applications from the Governor's Office to date. Each of these cases will be investigated and a recommendation made to the Governor in as timely a manner as possible. All applications need to be reviewed within ten years. The applications date back to 1994 and are being processed in order as received. Sherryl Snodgrass is number 80 on

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[5] The caption of § 902.2 was also changed from "[r]ecord of class 'A' felon reviewed" in the pre-1995 version to "[c]ommutation procedure for class 'A' felons" in the current version, a change which reflects the purpose of the revision.

> the list. It may be several years before her case is considered.

(Complaint ¶ 17). By post-hearing status reports the Court has been advised the Board has since considered Ms. Snodgrass' petition, did not recommend commutation, and on November 30, 2006 Governor Vilsack denied the petition.[6]

Ms. Snodgrass alleges the new version of § 902.2 "has created a significant risk of prolonging her incarceration" and that it is likely she "would have been freed from prison by now if the Board . . . had 'interview[ed]' her 'regularly' over the past ten years as required by the pre-1995 version of the statute." (Complaint ¶¶ 18, 19) (bracket original to Complaint).[7]

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[6] As the Complaint refers to the pendency of the clemency petition filed by Ms. Snodgrass and sought an immediate interview with the Board to address it, the petition's outcome is integral to the Complaint and a matter of public record which the Court may consider in connection with the motion.

The Court had held ruling on the present motion in abeyance pending review of the petition by the Board and Governor. While the Governor's action moots the prayer for immediate consideration of the then-pending clemency petition, the prayers for damages and prospective equitable relief remain.

[7] There is no indication if Ms. Snodgrass submitted a clemency petition or application at any time prior to 2004. If she did, her continued incarceration means it was rejected, a fact which would not be helpful to her contention she would have been released by now had the former version of § 902.2 remained in effect. If, on the other hand, Ms. Snodgrass did not previously apply for commutation, then her claim she would

(Continued on following page)

This lawsuit was commenced on September 14, 2005. Plaintiffs sue under 42 U.S.C. § 1983 to redress alleged violations of their federal constitutional rights.[8] The "First Claim for Relief" in the Complaint is in two counts and brought only by Ms. Snodgrass. In Count One she contends retroactive application to her of the revision to § 902.2 violates the *Ex Post Facto* Clause of Article I, § 10 of the United States Constitution. In Count Two Ms. Snodgrass asserts the retroactive application deprives her of a liberty interest without due process of law in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution. Both plaintiffs are parties to the "Second Claim for Relief" by which they allege the retroactive application of the § 902.2 revision constitutes an unwarranted interference with a right to familial association emanating from the First and Fourteenth Amendments to the Constitution.

II. Discussion

A. *Ex Post Facto*

The *Ex Post Facto* Clause states simply: "No State shall . . . pass any . . . ex post facto Law. . . ."

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have been released by now is dependent on showing the probability the Board would have acted on its own initiative through the interview process to recommend commutation. *See infra* at 13.

[8] The Court has federal question jurisdiction. 28 U.S.C. § 1331. The matter is before the undersigned pursuant to 28 U.S.C. § 636(c).

U.S. Const. art. I, § 10. Among other things, the clause has been held to prohibit retroactive application of enactments which would increase the punishment for a crime after the crime has been committed. *Garner v. Jones,* 529 U.S. 244, 250 (2000) (citing *Collins v. Youngblood,* 497 U.S. 37, 42 (1990) and *Beazell v. Ohio,* 269 U.S. 167, 169-70 (1925)); *see Johnson v. United States,* 529 U.S. 694, 699 (2000). In the case of parole the Supreme Court has held "[r]etroactive changes in laws governing parole of prisoners, in some instances" may be seen as increasing the punishment for a crime in violation of the *Ex Post Facto* Clause. *Garner,* 529 U.S. at 251; *see California Dep't of Corrections v. Morales,* 514 U.S. 499, 508-09 (1995). The "controlling inquiry" in this context is whether the retroactive change in the law creates "a sufficient risk of increasing the measure of punishment attached to the covered crimes," a "matter of degree." *Garner,* 529 U.S. at 250 (quoting *Morales,* 514 U.S. at 509). The requisite degree is present if it is shown a change in parole law "creates a significant risk of prolonging [the prisoner's] incarceration." *Id.* at 251. This may be apparent from the terms of the challenged law (or rule) or may be demonstrated "by evidence drawn from . . . practical implementation by the agency charged with exercising discretion that [the law's] retroactive application will result in a longer period of incarceration than under the earlier [law]." *Id.* at 255.

The Supreme Court's opinions in *Morales* and *Garner* are the starting point. *Morales* involved a

prisoner who had been convicted of two murders. The prisoner was nonetheless eligible for parole. A subsequent change in California law allowed the parole board to defer parole suitability hearings for up to three years in the case of a prisoner convicted of more than one homicide. 514 U.S. at 503. The Supreme Court rejected an *ex post facto* challenge on habeas corpus review because the statutory change "create[d] only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold [the Supreme Court] might establish under the *Ex Post Facto* Clause." 514 U.S. at 509.

Garner too involved a double murderer sentenced to life in prison. 529 U.S. at 247. Georgia law required the parole board to initially consider inmates serving life sentences for parole after seven years. At the time of the prisoner's second homicide parole board rules required reconsideration of life-serving inmates for parole every three years. Subsequently the rules were changed to provide for reconsideration "at least every eight years." *Id.* While dubious about the merits in view of the prisoner's serious criminal history, *id.* at 255, the Supreme Court reversed summary judgment on the *ex post facto* claim because the court of appeals' analysis had not indicated whether the amended rule created the requisite significant risk of increased punishment, nor had the prisoner's request to conduct discovery been addressed. *Id.* at 257.

Unlike the prisoners in *Morales* and *Garner,* Ms. Snodgrass is not eligible for parole. The mandatory sentence for the crime she committed is life in prison without possibility of parole. In Iowa, life means life unless the Governor exercises the authority vested in him by the Iowa constitution and statute to commute a life sentence to a term of years. Iowa Const. of 1857 (codified), art. IV, § 16; Iowa Code § 902.1, 914.1. The exercise of that authority is discretionary. *See Lyon v. State,* 404 N.W.2d 580, 583 (Iowa App. 1987). Then as now the Board's involvement in the commutation process is limited to making a recommendation to the Governor.

Parole and commutation are conceptually distinct and serve different purposes. Parole is an early release from incarceration prior to the end of the prison term to which the person has been sentenced. Iowa Code § 906.1. Commutation, on the other hand, is the substitution of a less severe sentence (in Ms. Snodgrass' case, a term of years) for the sentence imposed by the court (life without parole). *See* 59 Am. Jur. 2d *Pardon and Parole* § 5 at 13. "[T]he possibility of commutation is not equivalent to a possibility of parole, because commutation is an *ad hoc* exercise of executive clemency while '[p]arole is a regular part of the rehabilitative process.'" *Hatter v. Warden, Iowa Men's Reformatory,* 734 F. Supp. 1505, 1522 (N.D. Iowa 1990) (involving Iowa law and citing and quoting in part *Solem v. Helm,* 463 U.S. 277, 300-03 (1983)). There is no allegation in the Complaint that it is otherwise in Iowa. *See infra* at 14-15. "The

possibility of commutation is nothing more than a hope" for clemency. *Helm,* 463 U.S. at 303. In substance Ms. Snodgrass is arguing that a retroactive limitation on the frequency with which she may be considered for commutation to a sentence with a lesser punishment risks increasing her punishment under the sentence she did receive. The Court has great difficulty with this logic. The revision to § 902.2 does not have any effect on the length of the mandatory life sentence Ms. Snodgrass is serving. Life imprisonment – the maximum punishment provided by Iowa criminal law – is what anyone convicted in Iowa of first degree murder expects to receive. As there is no risk the measure of Ms. Snodgrass' punishment for the crime she committed has been increased by the revision to § 902.2, its application to her does not violate the *Ex Post Facto* Clause.

Beyond the critical distinction between commutation and parole, that the revision to § 902.2 creates a significant risk of prolonging Ms. Snodgrass' incarceration is not capable of proof beyond speculation under Iowa's statutory framework. Ms. Snodgrass is a long step removed from parole. She must first obtain commutation of her sentence. Neither by its terms nor in practical effect does the revision portend a longer stay in prison for Ms. Snodgrass.

Textually the revision to § 902.2 did not alter the likelihood of commutation from what might have occurred under the version in effect at the time Ms. Snodgrass was convicted. The 1995 revision changed the statute entirely. Prior to revision the statute only

required the Board to "interview" a class "A" felon within five years and "regularly thereafter." The statute did not require a hearing, any particular consideration to commutation, or mandate any recommendation to the Governor one way or the other. It simply provided an opportunity for the Board to initiate a commutation recommendation for those prisoners it thought should be considered for parole. The statute was silent concerning commutation applications by the prisoner. Other provisions in effect at the time of Ms. Snodgrass' conviction implicitly recognized such applications could be made, but said very little about procedure other than requiring the Governor to obtain the advice of the Board before granting a commutation. *See* Iowa Code §§ 248.6, .9, .10 (1981). In 1986 the legislature enacted legislation concerning reprieves, pardons and commutations which among other things expressly recognized the right of prisoners to apply for commutations and required the Governor to respond to a Board recommendation within ninety days, giving reasons for his action. 1986 Iowa Acts ch. 1112, §§ 5, 7, now codified at Iowa Code §§ 914.2-.4.[9] The evolution of Iowa law in this area with respect to class "A" felons was completed with the 1995 revision to § 902.2. The

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[9] Subsequent to the 1986 enactment the Board adopted administrative rules to implement Iowa Code chs. 902 and 914.

When § 902.2 was revised in 1995 the legislature amended the relevant provisions in ch. 914 to make them subject to § 902.2.1995 Iowa Acts ch. 128, § 2, 3.

revision substituted prisoner-initiated applications to the Governor (and Department of Corrections requests) for the former interview process as the means to bring the subject of commutation to the attention of the executive, and imposed procedural requirements that the Board conduct an investigation, report its findings, and make a recommendation whether the person should be considered for commutation.

The revision limited applications to the Governor to no more than once every ten years, but in company with the 1986 legislation gave Ms. Snodgrass significant procedural rights with respect to the determination of such an application. The less frequent, but more formal and comprehensive opportunity for commutation consideration afforded by the revision does not by its terms risk prolonging Ms. Snodgrass' incarceration.

Even in the absence of the ten-year limitation incorporated in the 1995 revision, there are as a practical matter only so many opportunities to assemble the necessary information and have full consideration be given to commuting a class "A" felon's life sentence to a lesser punishment. The likelihood that without the 1995 revision and prior to her 2004 clemency petition regular interviews with the Board would have gelled into a commutation recommendation, or would do so in the future sooner than the formalized ten-year application process now provided in § 902.2, seems very speculative. That this would occur is, if possible, rendered even more unknowable by the fact that since at least 1989 Board

rules have required that members of the Board unanimously agree to any favorable clemency recommendation for a class "A" felon. *See* Iowa Admin. Code § 205-14.5(1) (902) (1989 & 2006); *see id.* § 14.6(3) (2006) ("Any decision to recommend commutation shall be by unanimous vote."). The unanimity requirement reflects a policy that such commutation recommendations are both of particular importance and for the clear case.

Of course, regardless of the frequency with which the Board could have considered recommending commutation for class "A" felons under the former version of § 902.2, it has always been the Governor who makes the decision. The law does not set any standards or criteria by which the Governor is to exercise the power of commutation. Commutation is a matter of grace which may be granted or denied for any reason not in violation of law. A conceivably wide variety of policy, political, legal, moral and personal factors, some purely subjective, may inform a particular Governor in a particular case. How a Governor would react to a clemency recommendation if the Board were to make one in Ms. Snodgrass' case overlays a second tier of speculation.

Finally, the two core allegations of the Complaint – that the revision to § 902.2 created a significant risk of prolonging Ms. Snodgrass' incarceration and absent revision it is likely she would have been freed by now – are purely conclusory. The recent denial of Ms. Snodgrass' 2004 clemency petition together with the fact Ms. Snodgrass' pre-1995 interviews with the

Board did not lead to commutation appear to preclude the latter proposition and make both incapable of proof to the extent based on the subjective appeal of her cause. Only if plaintiff alleged that at the time she committed the crime Iowa had a policy, history or practice of, with some degree of consistency, granting commutations to similarly situated life-term inmates could a significant risk of longer incarceration by reason of the revision to § 902.2 conceivably be established. *See Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458, 465 (1981) (in which the Connecticut Board of Pardons had a "consistent practice of granting commutations to most life inmates."). There is no such allegation here, and the Court doubts very much that one could be made.

In view of the foregoing, the Court has concluded that beyond doubt Ms. Snodgrass is not entitled to any relief on her *Ex Post Facto* claim.

B. *Due Process*

Ms. Snodgrass argues that the former version of § 902.2 gave her a protected liberty interest in regular interviews with the Board. She does not argue she has a liberty interest in commutation itself, nor could she. The former version of § 902.2 on which she relies did not impose any standards on the Board by which to determine whether to recommend commutation, much less on the Governor. Absent explicit standards, there is no "right or entitlement sufficient to invoke the Due Process Clause." *Whitmore v. Gaines,* 24 F.3d

1032, 1034 (8th Cir. 1994) (citing *Dumschat,* 452 U.S. at 466-67); *see Joubert v. Nebraska Board of Pardons,* 87 F.3d 966, 968 (8th Cir.), *cert. denied,* 518 U.S. 1035 (1996); *Otey v. Stenberg,* 34 F.3d 635, 637 (8th Cir.), *cert. denied,* 512 U.S. 1279 (1994). Rather, Ms. Snodgrass' due process claim is dependent on the merits of her *ex post facto* claim. She argues: "Because defendants cannot apply the provisions of present § 902.2. without violating the *Ex Post Facto* Clause . . . she is entitled to the regular interviews guaranteed to her in the pre-1995 version of that statute." (Pl. Resistance at 9). As the Iowa legislature was free to revise § 902.2 to eliminate the regular interview requirement, any liberty interest in the interviews did not survive.

C. *Interference with Familial Association*

In her Complaint Ms. Snodgrass alleges:

> Defendants' retroactive application of the present version of § 902.2 to Ms. Snodgrass' case violates the First and Fourteenth Amendments to the United States Constitution, because it constitutes an "unwarranted interference" with the rights of both Ms. Snodgrass and her daughter, plaintiff Juliann Lawrence, to familial association under . . . the First and Fourteenth Amendments.

(Complaint ¶ 33). The constitutional foundation for plaintiffs' familial association claim lies in the First Amendment's protection of the right of freedom of association and a due process liberty interest in the

sanctity of family relationships. *Roberts v. United States Jaycees,* 468 U.S. 609, 617-18 (1984); *see Overton v. Bazzetta,* 539 U.S. 126, 131 (2003); *Board of Directors of Rotary Int'l v. Rotary Club,* 481 U.S. 537, 545 (1987); *Moore v. City of East Cleveland,* 431 U.S. 494, 503-04 (1977). Ms. Snodgrass cites Ninth Circuit case law recognizing interference with familial association claims in the context of an action by mother and son against a city and its police officers for false arrest and subsequent incarceration, *Lee v. City of Los Angeles,* 250 F.3d 668, 685-86 (9th Cir. 2001), and an action by children for the excessive force shooting death of their father. *Smith v. City of Fontana,* 818 F.2d 1411, 1419-20 (9th Cir. 1987). For the purposes of the present motion the Court will assume that a constitutional interference with familial association claim may result where the complained of actions by state officials are not specifically directed at the familial relationship. But *see Russ v. Watts,* 414 F.3d 783, 788-90 (7th Cir. 2005)), *cert. denied,* 126 S. Ct. 1065 (2006) (no constitutional violation where violations not directed at parent-child relationship; *Harpole v. Ark. Dept. of Human Services,* 820 F.2d 923, 928 (8th Cir. 1987) (citing case law noting the difference between government action which directly and that which indirectly affects parent-child relationship).

There are two related, fundamental difficulties with the familial association claim here. First, it too is dependent on the merits of Ms. Snodgrass' *ex post facto* claim. If the elimination of the regular interview

requirement in § 902.2 can constitutionally be applied to Ms. Snodgrass, there can be no "unwarranted interference" with the familial relationship. Second, even if Ms. Snodgrass remains entitled to the regular interviews provided for in the former version of the statute, there has still been no unwarranted interference. Ms. Snodgrass remains lawfully incarcerated following conviction for the crime of murder. "An inmate does not retain rights inconsistent with proper incarceration," the least compatible of which is freedom of association. *Overton,* 539 U.S. at 131 (citing *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 125 (1977); *Shaw v. Murphy,* 532 U.S. 223, 229 (2001); and *Hewitt v. Helms,* 459 U.S. 460 (1983)). "The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside of the penal institution." *Jones,* 433 U.S. at 126. Though Ms. Snodgrass and her daughter understandably hope that Ms. Snodgrass' sentence will someday be commuted allowing her to be paroled, they have no legitimate expectancy in clemency which would arguably support a § 1983 action for interference with the relationship between them.

III. Ruling and Order

For the foregoing reasons, defendants' motion to dismiss is granted. The Clerk of Court shall enter judgment dismissing the complaint.

IT IS SO ORDERED.

Dated this 24th day of January, 2007.

ROSS A. WALTERS
UNITED STATES MAGISTRATE JUDGE

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(2)

No. 07-1282

FILED

JUN 26 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

SHERRYL ANN SNODGRASS,

Petitioner,

v.

ELIZABETH ROBINSON, Chair of the Iowa Board of Parole, in her individual and official capacity; KAREN MUELHAUPT, Vice Chair of the Iowa Board of Parole, in her individual and official capacity; RICHARD S. BORDWELL, Member, Iowa Board of Parole, in his individual and official capacity; CURTIS S. JENKINS, Member, Iowa Board of Parole, in his individual and official capacity; BARBARA BINNIE, Member, Iowa Board of Parole, in her individual and official capacity; IOWA BOARD OF PAROLE; and CHESTER J. CULVER, Governor of Iowa,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the *Ex Post Facto* Clause of the United States Constitution is implicated when the Petitioner was convicted of first degree murder in 1982, sentenced to life in prison without eligibility for parole (unless the Governor of Iowa commutes her sentence to a term of years) and a change in the law enacted in 1995 limits only the frequency of the Petitioner's applications to the Governor for commutation which trigger a review and recommendation on commutation by the Board of Parole, but commutation itself remains a matter of grace vested in the discretion of the Governor?

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OPINIONS BELOW

The Respondents accept the Petitioner's statement regarding the opinions below.

JURISDICTION

The Respondents accept the Petitioner's statement regarding the Court's jurisdiction over this matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondents accept the Petitioner's statement regarding the constitutional and statutory provisions at issue in this case, with the addition of the following Iowa statutory references:

At the time of Petitioner Sherryl Ann Snodgrass' commission of the act for which she was convicted of murder in the first degree, a class "A" felony under Iowa law, Iowa Code § 902.2 (1981) read:

> The [Iowa Board of Parole] shall interview a class "A" felon within five years of the felon's confinement and regularly thereafter. If, in the opinion of the board, the person should be considered for release on parole, the board shall recommend to the governor that the person's sentence be commuted to a term of years. If the person's sentence is so

> commuted, the person shall be eligible for parole as provided in [Iowa Code] chapter 906.

Following amendments enacted in 1995 by the Iowa General Assembly, Iowa Code § 902.2 (2007) now reads:

> A person who has been sentenced to life imprisonment under section 902.1 may, no more frequently than once every ten years, make an application to the governor requesting that the person's sentence be commuted to a term of years. The director of the Iowa department of corrections may make a request to the governor that a person's sentence be commuted to a term of years at any time. Upon receipt of a request for commutation, the governor shall send a copy of the request to the Iowa board of parole for investigation and recommendations as to whether the person should be considered for commutation. The board shall conduct an interview of the class "A" felon and shall make a report of its findings and recommendations to the governor.

STATEMENT OF THE CASE

The Respondents generally accept the Petitioner's Statement of the Case with the following corrections and clarifications: At the time Petitioner committed her crime, class "A" felons had no statutory right to directly seek on their own accord a

sentence commutation from the Governor. It was not until 1986, four years after the Petitioner's conviction, that the Iowa Code first expressly authorized inmates to directly petition the Governor themselves for commutation. *See* 1986 Iowa Acts ch. 1112, § 5 (Right of application).

It was not until 1989, seven years after the Petitioner's conviction, that the Iowa Board of Parole amended its administrative rules so as to allow an inmate participating in a Board interview "ample opportunity to express views and present materials." *Compare* 615 Iowa Admin. Code § 3.6 (6/25/1980) *with* 205 Iowa Admin. Code § 14.2(1) (2/22/1989). Prior to that time, the Board of Parole's administrative rules governed the timing of interviews for class "A" felons as represented by the Petitioner, but did not place any procedural restraints upon the Board as to how the interviews were to be conducted.

The subjective and speculative aspect of the commutation process in the State of Iowa is amply illustrated by the difficulty of completing the application form about which the Petitioner complains in her petition. *See* Petition at p. 4. For example, Iowa law does not require that all court costs, fines, and restitution be paid prior to submission and consideration of an application for commutation of life sentence. *See generally* Iowa Code ch. 914 (2007) (Reprieves, Pardons, Commutations, Remissions, and Restorations of Rights); *see* Iowa Code ch. 248 (1981) (predecessor to today's Iowa Code chapter 914). Instead, the Governor alone dictates the application form and

the criteria that must be met before an application for commutation will be granted. Iowa Code § 914.1 (2007); *see* Iowa Code § 248.1 (1981). The Governor may demand the fulfillment of any number of complicated or difficult to fulfill criteria prior to granting a clemency application regardless of whether it is the Board of Parole, the Director of the Department of Corrections, or the inmate herself from which the request for commutation originated.

Lastly, in February 2004, the Petitioner submitted to then Iowa Governor Thomas J. Vilsack an application seeking commutation of her life sentence to a term of years. In a letter dated May 13, 2004, Iowa Board of Parole Chairwoman Elizabeth Robinson acknowledged receipt of the Petitioner's application and stated that it would be docketed and investigated in the order received. The Petitioner's application for commutation of life sentence was in fact investigated and reviewed by the Iowa Board of Parole in the order in which it was received. Governor Vilsack denied the Petitioner's application for commutation of life sentence on November 30, 2006.

REASONS FOR DENYING THE PETITION

I. NO CONFLICT EXISTS BETWEEN THE EIGHTH CIRCUIT'S DECISION AFFIRMING IOWA'S COMMUTATION PROCESS AND THE RULINGS OF THIS COURT RELATING TO THE RETROACTIVE APPLICATION OF AMENDED PAROLE PROCEDURES.

A. *Commutation versus Parole*

The Petitioner repeatedly argues that the Respondents' actions have unlawfully restricted her access to *parole*, and thus delayed her early release from prison. In affirming the District Court's dismissal of the Petitioner's section 1983 complaint, the Eighth Circuit Court of Appeals rightly distinguished between commutation and parole procedures. The Petitioner now challenges the Court of Appeals for recognizing and considering the inherently speculative nature of commutation decisions as opposed to normal parole determinations.

In so arguing, the Petitioner would have this Court believe that commutation of a sentence under Iowa law is merely one additional, but routine, step in the normal parole process. Yet, as this Court has long recognized:

> As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast

> majority of cases. . . . Commutation, on the other hand, is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards.

Solem v. Helm, 463 U.S. 277, 300-01 (1983); *see Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) ("Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals.").

Having been lawfully convicted of a class "A" felony in the State of Iowa based upon her involvement in her husband's murder, the Petitioner's only hope of release from incarceration rests upon receipt of a sentence commutation from the Governor. Iowa Code § 902.1 (1981) ("no person convicted of a class 'A' felony shall be released on parole unless the governor commutes the sentence to a term of years."); *see also* Iowa Code § 902.1 (2007). Consequently, the relevancy of the fact that the Petitioner's eligibility for release from prison is wholly dependent on the Governor's subjective and unconditioned exercise of discretion and mercy cannot be overstated.

Thus, as the Court of Appeals correctly noted, the Petitioner's claim "does not hinge on the availability of parole, but on the availability of a commutation – the only means by which she might become eligible for parole." *Snodgrass v. Robinson*, 512 F.3d 999, 1002 (8th Cir. 2008). Contrary to the Petitioner's efforts to assert otherwise, the Court of Appeals' recognition of this important distinction was not only

principled, but absolutely necessary to correctly analyze the merits of the Petitioner's *ex post facto* claim.

B. *Morales* and *Garner*

The Court of Appeals correctly applied the holdings of *California Department of Corrections v. Morales* and *Garner v. Jones* in determining that the Petitioner could not establish beyond mere speculation that she faced a significant risk of prolonging her term of incarceration as a result of the challenged 1995 statutory amendments. Such conjectural effects based on speculation and attenuated possibilities have been rejected as insufficient as a matter of law to establish an *ex post facto* violation. *See California Dep't of Corrections v. Morales*, 514 U.S. 499, 509 (1995). Thus, no conflict exists between the Court of Appeals' decision and this Court's precedents as alleged by the Petitioner.

The prohibition against the passage of *ex post facto* laws does not require that a criminal's sentence be carried out under the identical legal regime that prevailed at the time of her criminal offense. *Morales*, 514 U.S. at 510 n.6 (1995); *see also Garner v. Jones*, 529 U.S. 244, 250 (2000) ("not every retroactive procedural change creating a risk of affecting an inmate's terms or conditions of confinement is prohibited."). Within the context of parole procedures, a change in law will be deemed illegal when retroactively applied only if the amended procedures create a

significant risk of prolonging an inmate's incarceration. *Garner*, 529 U.S. at 251; *Morales*, 514 U.S. at 509.

As noted by the Court:

> The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards.

Solem, 463 U.S. at 300-01. Thus, the distinction that the Petitioner would have the Court ignore between commutation and parole proceedings truly impacts whether the Petitioner can predict with certainty a Governor's subjective and unconditioned exercise of discretion in granting sentence commutations.

Despite her arguments to the contrary, the Petitioner is not similarly situated to the inmates who were the subjects of *California Department of Corrections v. Morales* and *Garner v. Jones*. Though Jose Morales and Robert Jones were each serving life sentences, Morales and Jones did not need to await the grant of executive clemency to obtain their release from prison as they were both already eligible for parole under applicable state law. *See Morales*, 514 U.S. at 502; *Garner*, 529 U.S. at 247. Unlike Morales and Jones the Petitioner's only hope, as a

class "A" felon in the State of Iowa, of gaining release from incarceration rests upon her receipt of a sentence commutation from the Governor.

C. Discovery Unnecessary

Furthermore, it is difficult to envision what degree of discovery could possibly provide meaningful insight into any particular Governor's subjective motivations and anticipated actions on any given day so as to enable the Petitioner to establish the required showing under *Garner v. Jones* that her life term of incarceration has somehow been lengthened by the relevant 1995 statutory amendment. *Garner v. Jones* does not compel a District Court or the Court of Appeals to order discovery if that court determines that the speculative nature of an inmate's claims simply cannot be overcome as a matter of law.

The Court of Appeals was absolutely correct in its determination that the "unpredictability of a wholly discretionary grant of commutation in Iowa precludes the Petitioner from demonstrating that the changes in Iowa's law raise a 'significant risk' that she will be denied a commutation she otherwise would have received." *Snodgrass*, 512 F.3d at 1002. Regardless of how often the Petitioner interviews with the Board of Parole or which correctional personnel may support her application, the grant of commutation remains solely rooted in the Governor's subjective and unconditioned exercise of discretion and mercy. *Lyon v. State*, 404 N.W.2d 580, 583 (Iowa Ct. App. 1987) ("no

substantive predicates are placed upon the governor's discretion in granting a commutation of sentence.").

For this reason, this Court has opined that "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981). The same rings true in this case. Mere speculation or hope that the Governor may someday exercise mercy and commute her sentence to a term of years does nothing to alter the fact that the Petitioner was legally sentenced to life without parole. *See Dumschat*, 452 U.S. at 464 ("the mere existence of a power to commute a lawfully imposed sentence, and the granting of commutations to many petitioners, create no right or 'entitlement.'").

Former Governor Vilsack's recent rejection of the Petitioner's pleas for commutation in November 2006 aptly illustrates the speculative and conclusory nature of the Petitioner's allegation that she would have been released from prison by now but for the application of the 1995 statutory amendments. Unlike assigning a parole eligibility date to an inmate serving a mandatory minimum term of years, the Petitioner cannot realistically predict when, if ever, she will benefit from the Governor's exercise of mercy to substitute a lesser term of years for her legally imposed life sentence. Absent proof beyond mere speculation, an *ex post facto* claim is not viable. *See Morales*, 514 U.S. at 509.

II. THERE IS NO OVERWHELMING NEED FOR THE COURT'S GUIDANCE ON THE ISSUE PRESENTED BY THIS CASE.

The Petitioner claims that hundreds of Iowa inmates would benefit from clarification of the constitutionality of the retroactive application of the 1995 amendments to Iowa Code section 902.2 to the state's previously incarcerated class "A" felons. Petition at p. 26. In making such arguments, the Petitioner overstates both the impact and importance of the 1995 statutory amendments to Iowa's prison population. The lack of any litigation in the State of Iowa beyond this case concerning Iowa Code section 902.2 coupled with the void of federal appellate review of amendments to commutation practices demonstrates that there is not a true need for the Court's consideration and guidance on the subject at this time.

A. Minimal Judicial Challenges

In the nearly 13 years since Iowa Code section 902.2 was amended to eliminate periodic Board of Parole interviews for class "A" felons, the Petitioner's case is the only case, reported or otherwise, that counsel could identify that challenged the amended statute on *ex post facto* grounds. Such a lack of litigation by those persons most affected by the 1995 amendments provides compelling evidence that commutation is not viewed as an integral part of Iowa's sentencing scheme and that access to

commutation review has not been impacted to the degree the Petitioner alleges.

In fact, a reasonable argument can be made that the Petitioner has an equal or greater opportunity today than she did in 1982 to have her case for commutation actually presented to and reviewed by the Governor. The version of Iowa Code section 902.2 in effect at the time of the Petitioner's murder conviction only required that the Board of Parole periodically interview class "A" felons. Iowa Code § 902.2 (1981). The Board had no procedural rules to guide how a class "A" felon's status interview was to be conducted. *See* 615 Iowa Admin. Code § 3.7 (6/25/1980). Nor was a class "A" felon guaranteed the right to present information in support of a commutation recommendation. *Id.* The law left to the sole discretion of the Board of Parole which cases, if any, it forwarded to the Governor for commutation consideration. Iowa Code § 902.2 (1981); 615 Iowa Admin. Code § 3.7 (6/25/1980).

All inmate commutation applications are now sent to the Governor for consideration, even those applications that, like the Petitioner's, the Board of Parole recommends be denied. Because the Governor is not bound by the Board's recommendations, those applications failing to gain the Board's approval may still be considered and granted.[1]

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[1] In fact, on January 5, 2007, former Governor Vilsack commuted the mandatory minimum sentence of Dixie Shanahan

(Continued on following page)

The Petitioner is mistaken in her assertion that she is precluded from gaining an interview before the Board of Parole more often than once every decade. Today's law may only allow class "A" felons to submit an application for commutation on their own behalf once every ten years, but the Director of the Department of Corrections retains the authority to do so on an inmate's behalf *at any time*. Iowa Code § 902.2 (2007). Thus, the 1995 law simply shifted from the Board of Parole to the Department of Corrections the authority to bring those commutation applicants who, in its opinion are deserving of extra consideration, to the Governor's attention. If her case for commutation is as meritorious as the Petitioner alleges, further intervention by this Court is unnecessary as the Petitioner should have no problem convincing the Iowa Department of Corrections to submit future applications to the Governor on her behalf as often as deemed appropriate. *See* Iowa Code § 902.2 (2007).

B. No Conflict Among Federal Circuits

A diligent search identified only one reported Court of Appeals decision outside the Eighth Circuit that addressed the merits of an *ex post facto* challenge to commutation procedures. In a case that predates this Court's rulings in *Garner* and *Morales*,

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Duty over the Board of Parole's objections. Letter from Thomas J. Vilsack, Governor of Iowa, to Elizabeth Robinson, Chairperson, Iowa Board of Parole (Jan. 5, 2007) (copy may be accessed at http://editor.learfield.com/mp3/vilsack_letter.pdf).

the Fifth Circuit Court of Appeals found that the repeal of a Louisiana statute that contained provisions pertaining to the process by which a prisoner sentenced to life imprisonment could obtain a sentence commutation did not constitute a violation of the *Ex Post Facto* Clause. *See Dunn v. Maggio*, 712 F.2d 998, 1001-02 (5th Cir. 1983). The fact that only one reported Court of Appeals case in addition to the Petitioner's could be identified relating to an *ex post facto* challenge to revised commutation standards provides further basis to conclude that the Court's direct guidance on this issue is unnecessary at this time.

In a series of unreported decisions, however, the Fifth Circuit has instructed the United States District Court for the Middle District of Louisiana to evaluate whether in view of *Morales* and *Garner* the State of Louisiana's application of amendments to its commutation procedures, including the imposition of a mandatory waiting period to reapply for sentence commutation, constitutes an *ex post facto* violation. *See Howard v. Blanco*, No. 07-30046, 2008 WL 118367 (5th Cir., Jan. 14, 2008); *Sears v. Blanco*, No. 07-30246, 2008 WL 552501 (5th Cir., Feb. 29, 2008); *Mason v. Blanco*, No. 07-30367, 2008 WL 687292 (5th Cir., March 13, 2008). Undoubtedly, these cases will provide the Fifth Circuit Court of Appeals an opportunity to reassess its ruling in *Dunn v. Maggio* and provide its own detailed insight into the applicability of *Morales* and *Garner* to commutation proceedings. It is appropriate for the Court to defer taking up the issue of retroactive application of amended

commutation procedures until such time as the Fifth Circuit decides that *Dunn v. Maggio* should be reversed in view of this Court's recent *ex post facto* pronouncements.

C. Interviews Imperfect Remedy

Perhaps of greatest importance to the present case is the likelihood that a return to the Iowa Board of Parole's former practice of providing qualifying class "A" inmates annual interviews will not actually remedy the shortfalls in the commutation application process of which the Petitioner complains. *See* Petition at pp. 4, 9, 29-30. Because it is the Governor alone who dictates the criteria that must be met before an inmate will be granted a sentence commutation, reverting to the former statutory scheme will do nothing to preclude the Governor from demanding from the Petitioner the fulfillment of any number of factors as a prerequisite to receiving executive clemency including: the payment of all fines, court costs and restitution; collection of relevant court documents and other filings; and the presentation of letters of recommendation from any host of persons including the presiding judge, the prosecutor, and affected victims.

Thus, depending on the subjective policy prerogatives of the presiding chief executive, the Petitioner could face as difficult a time receiving full consideration for commutation as she does now under current Iowa Code section 902.2. Consequently, now, as

before, the Petitioner's only hope of release rests upon receipt of a sentence commutation from the Governor. *See* Iowa Code § 902.1 (1981, 2007).

CONCLUSION

For the above-stated reasons, the Respondents respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioner Sherryl Ann Snodgrass.

Respectfully submitted,

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In The
Supreme Court of the United States

SHERRYL ANN SNODGRASS,

Petitioner,

v.

ELIZABETH ROBINSON, Chair of the Iowa Board of Parole, in her individual and official capacity; KAREN MUELHAUPT, Vice Chair of the Iowa Board of Parole, in her individual and official capacity; RICHARD S. BORDWELL, Member, Iowa Board of Parole, in his individual and official capacity; CURTIS S. JENKINS, Member, Iowa Board of Parole, in his individual and official capacity; BARBARA BINNIE, Member, Iowa Board of Parole, in her individual and official capacity; IOWA BOARD OF PAROLE; and CHESTER J. CULVER, Governor of Iowa,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Respondents' opposition brief cites three *per curiam* decisions of the Fifth Circuit Court of Appeals that are in direct conflict with the decision of the Eighth Circuit Court of Appeals in the present case. Brief in Opp., pp. 14-15. These three unreported decisions were issued by three different three-judge panels in January 2008, February 2008, and March 2008, respectively. Each of the three opinions distinguishes *Dunn v. Maggio*, 712 F.2d 998 (5th Cir. 1983), which rejected a prisoner's *ex post facto* challenge to the 1979 repeal of a statute that previously had governed the commutation process in Louisiana; and each vacates a district court's judgment dismissing a prisoner's complaint that the retroactive application to him of LA.REV.STAT. ANN. § 15:574.2(D), which establishes multi-year waiting periods between successive commutation applications by inmates serving life sentences, violates the *Ex Post Facto* Clause of Article I § 10 of the United States Constitution. The critical paragraphs in these three opinions are nearly identical:

> In *Dunn v. Maggio*, 712 F.2d 998, 1001-02 (5th Cir. 1983), this court rejected a claim that the repeal of LA.REV.STAT. ANN. § 15:571.7, which contained provisions pertaining to the process by which a prisoner sentenced to life imprisonment may obtain a commutation of his sentence, constituted a violation of the Ex Post Facto Clause. However, the court in *Dunn* did not resolve the

issue central to the instant case, which is whether the application to [plaintiff-appellant] of current Louisiana law governing the pardon and sentence commutation process violates the Ex Post Facto Clause.

The Supreme Court, in *Garner v. Jones*, 529 U.S. 244, 255 (2000) and in *California Dept. of Corr. v. Morales*, 514 U.S. 499 (1995), has issued decisions addressing substantially similar claims challenging the application of changes in the timing of parole reconsideration hearings as violative of the Ex Post Facto Clause. Under the principles of the above cases, to state a claim on which relief could be granted [plaintiff-appellant] was required to plead facts that would show that, "as applied to his own sentence," the new laws governing the process for obtaining a pardon or commutation of his sentence "created a significant risk of increasing his punishment." *See Garner*, 529 U.S. at 255.

Considering the above authorities, relevant Louisiana statutory provisions, and the allegations of [the plaintiff-appellant's] complaint, we have determined that [plaintiff-appellant] has stated a claim on which relief can be granted. Accordingly, [plaintiff-appellant's] IFP motion is granted, the judgment of the district court is vacated, and the matter is remanded to the district court for further proceedings.

Howard v. Blanco, No. 07-30046, 2008 WL 118367, at 2 (5th Cir., Jan. 14, 2008) (parallel citations omitted). *See also Sears v. Blanco*, No. 07-30246, 2008 WL 552501, at 1-2 (5th Cir., Feb. 29, 2008); *Mason v. Blanco*, No. 07-30367, 2008 WL 687292, at 1-2 (5th Cir., Mar. 13, 2008).

Rather puzzlingly, respondents assert that "these cases will provide the Fifth Circuit Court of Appeals an opportunity to reassess its ruling in *Dunn v. Maggio* and provide its own detailed insight into the applicability of *Morales* and *Garner* to commutation proceedings." Brief in Opp., p. 14. In fact, three different panels of the Fifth Circuit have already concluded – in these cases – that the principles established in *Morales* and *Garner are* applicable to commutation proceedings. Further, each of these panels has explicitly held that *Dunn v. Maggio* "did *not* resolve the issue central to [each of these cases], which is whether the application [to the plaintiff-appellants] of current Louisiana law governing the pardon and sentence commutation process violates the Ex Post Facto Clause." *See Howard* at 2; *Sears* at 1; *Mason* at 1 (emphasis added).

Respondents' opposition brief argues that "[i]t is appropriate for [this] Court to defer taking up the issue of retroactive application of amended commutation procedures until such time as the Fifth Circuit decides that *Dunn v. Maggio* should be reversed in view of this Court's recent *ex post facto* pronouncements." Brief in Opp., pp. 14-15. It appears, however,

that "such time" is unlikely to arrive soon, if ever. Not only have three different Fifth Circuit panels, comprising seven different judges, concluded that *Dunn* is irrelevant to controversies like the one currently before this Court, but nothing in the opinions produced by these panels remotely suggests that the twenty-five-year-old precedent established by *Dunn* should be overturned. Perhaps even more tellingly, a relatively recent *per curiam* decision by another three-judge panel of the Fifth Circuit specifically reaffirms the holding of *Dunn*. *See Nero v. Blanco*, No. 07-30043, 2007 WL 4375521 (5th Cir., Dec. 12, 2007).

In short, there is no merit to respondents' suggestion that this Court should stay its hand in the present case and await yet an additional decision from the Fifth Circuit, which has already made it abundantly clear that, in its view, the retroactive application of "new laws governing the process for obtaining a pardon or commutation of [a life] sentence" may violate the *Ex Post Facto* Clause. *See Howard* at 2; *Sears* at 2; *Mason* at 1. The issues between petitioner, on one hand, and the Iowa Board of Parole and the Governor of Iowa, on the other, are clearly drawn and ripe for decision by this Court. Petitioner respectfully

requests that her petition for a writ of certiorari be granted.

Respectfully submitted,

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